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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

EVERETT R. RHOADES, M.D., DIRECTOR OF THE INDIAN HEALTH SERVICE, *et al.*,
Petitioners,

v.

GROVER VIGIL, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF AMICI CURIAE ON BEHALF OF SIX AMERICAN INDIAN TRIBES AND TRIBAL ORGANIZATIONS IN SUPPORT OF RESPONDENTS

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BRIEF AMICI CURIAE ON BEHALF OF SIX AMERICAN INDIAN TRIBES AND TRIBAL ORGANIZATIONS IN SUPPORT OF RESPONDENTS

The amici described below submit this brief because of the unusual importance of this case to Indian tribes and tribal organizations which rely upon the Indian Health Service (IHS) for health services to their members, or which operate their own health care programs in conjunction with the IHS under the Indian Self-Determination and Education Assistance Act, Pub. L. 93-638, 25 U.S.C. §§ 450-450n (Indian Self-Determination Act). We urge this Court to uphold the decision below.

INTERESTS OF AMICI CURIAE

Amicus BRISTOL BAY AREA HEALTH CORPORATION (BBAHC) is a private, non-profit corporation organized in June 1973, by the Alaska Native villages of the Bristol Bay region in Alaska. BBAHC provides a wide variety of health services including hospital, family medicine, dental, mental health, alcoholism treatment, health education and other preventive health services. BBAHC serves more than 7,000 year-round residents and 32 Alaska Native villages within the Bristol Bay and a portion of the Calista regions, two of the twelve regions into which Alaska was divided in 1971 under the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1629e. The Bristol Bay region encompasses a portion of southwest Alaska that is approximately the size of the State of Ohio. In 1980, BBAHC became the first tribal organization in the United States to take over the operation of a hospital from the IHS under the authority of the Indian Self-Determination Act.

Amicus MENOMINEE INDIAN TRIBE (Menominee Tribe) is a federally recognized Indian tribe residing on the Menominee Indian Reservation in Wisconsin. The Menominee Tribe's sovereign authority has been recognized by several treaties, principally the Treaty of May 12, 1854, 10 Stat. 1064, 2 Kappler 626, which established the Menominee Reservation. Federal recognition of the Menominee Tribe was terminated in 1954, 68 Stat. 250, but was restored in 1973, 87 Stat. 770, 25 U.S.C. §§ 903-903f. The Menominee Tribe operates a comprehensive outpatient health care program, including a clinic and dental clinic and programs for community health, reproductive health, mental health, alcohol and substance abuse, and emergency medical services. The Menominee Tribe has operated these programs since 1977 under an Indian Self-Determination Act contract with the IHS. The Menominee Tribe's current service population is more than 3,900.

Amicus METLAKATLA INDIAN COMMUNITY (Metlakatla Community) is a federally recognized Indian tribe residing on the Annette Islands Reservation in southeast Alaska. This reservation is the only remaining federal Indian reservation in Alaska. 25 U.S.C. § 495. Approximately 1,300 tribal members reside on the reservation. Pursuant to section 16 of the Indian Reorganization Act 25 U.S.C. § 476, the Metlakatla Community has adopted a constitution and bylaws which were approved by the Secretary of the Interior on August 23, 1944. The Metlakatla Community provides a range of health services to its members including a health clinic, a dental clinic, a mental health program, a community health program, a pre-natal care clinic and a diabetes clinic, all through a contract with the IHS under the Indian Self-Determination Act.

Amicus MISSISSIPPI BAND OF CHOCTAW INDIANS (Choctaw Band) is a federally recognized Indian tribe residing on the Mississippi Choctaw Reservation in Mississippi. The Choctaw Band is comprised of descendants of Choctaw Indians who resisted relocation to Indian Territory (now Oklahoma) following the Treaty of Dancing Rabbit Creek, Sept. 30, 1830, 7 Stat. 333, 2 Kappler 310. The Choctaw Band's lands were proclaimed a federal Indian reservation in December 1944, 9 Fed. Reg. 14,907, pursuant to an Act of Congress. 53 Stat. 851. Pursuant to the Indian Reorganization Act, the Choctaw Band has adopted a constitution and bylaws which were approved by the Secretary of the Interior in May 1945. Through a contract with the IHS under the Indian Self-Determination Act, the Choctaw Band operates a comprehensive health services program which includes a hospital and three field clinics. The services provided include inpatient and outpatient medical care, dental care, mental health and alcoholism, emergency medical services, community health, and environmental health. The Choctaw Band has contracted with the IHS since 1971, beginning with the Community Health Representatives

program, and since 1981 the Choctaw Band has operated the entire IHS health care program for the reservation under contract. The Choctaw Band's service population is more than 6,000 people.

Amicus NARRAGANSETT INDIAN TRIBE (Narragansett Tribe) is a federally recognized Indian tribe occupying a federal Indian reservation near Charlestown, Rhode Island. The Narragansett Tribe presently provides health services to eligible members through an IHS contract, including a community health program, alcohol and substance abuse program, public health nutrition services, with the balance of medical, dental and pharmaceutical health services provided by private health providers in the surrounding communities. The Narragansett Tribe has about 2,000 members. The Narragansett Tribe's plans for 1993 are to establish an outpatient clinic to provide health service directly to the Narragansett Tribe's Indian population.

Amicus NORTON SOUND HEALTH CORPORATION (NSHC) is a non-profit corporation organized and controlled by the sixteen Alaska Native villages in the Bering Straits region of Alaska, which provides health care services to more than 6,150 Alaska Native residents of the region, one of the aforesaid twelve Alaska Native regions. The region served by NSHC encompasses a sizeable portion of northwest Alaska, over 25,000 square miles, an area larger than the State of West Virginia.

SUMMARY OF ARGUMENT

The Tenth Circuit Court of Appeals ruled in the decision below that the Indian Health Service's (IHS) termination of the Indian Children's Project (ICP) was not committed to agency discretion and was therefore judicially reviewable under the Administrative Procedure Act (APA), 5 U.S.C. § 701(a)(2). In doing so, the Court concluded that Congressional intent to fund the ICP, together with the federal trust responsibility to the Indian tribes and the directives of the Snyder Act, 25 U.S.C.

§ 13, provided "law to apply" for purposes of judicial review.

Seeking reversal, the Government argues, *inter alia*, that the Court of Appeal's use of legislative history is in direct conflict with Justice Scalia's opinion in *International Union, UAW v. Donovan*, 746 F.2d 855 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 825 (1985). Your amici disagree. The Government's reliance on *Donovan* is misplaced since this case differs significantly from *Donovan* in two respects. First, the unique fiduciary responsibilities of the United States in this instance hold the IHS's conduct to a higher standard than that required of the agency involved in *Donovan*. Thus, while under normal circumstances, an agency's representations to Congress and to the beneficiaries it serves might not provide meaningful standards of review, the IHS's representations to Congress and the Indian tribes do so in this case. Second, unlike the IHS here, the *Donovan* agency never represented to Congress that it supported the program in controversy nor did its actions ever disregard the intentions of Congress. Furthermore, even the additional limitations suggested by Justice Scalia in *Webster v. Doe*, 486 U.S. 592 (1988) (Scalia, J., dissenting), do not preclude review.

Finally, the Government's contention that legislative history may never supply "law to apply" is erroneous. Therefore, the IHS's decision to terminate the ICP *without any prior notice* is not committed to agency discretion by law.

ARGUMENT

INTRODUCTION

The Government mistakenly contends that the Court of Appeals' decision "strips discretion from federal agencies in allocating agency resources" and "requires an agency to undertake notice-and-comment rulemaking whenever a contemplated action could have an adverse impact on Indians." (Petitioner's Brief at 12.) But that is not the case. The decision below neither limits the agency's discretion to allocate resources nor does it require rulemaking procedures in every instance. Rather, the Court of Appeals' decision only requires notice and comment procedures when the IHS terminates a program to the detriment of Indian tribes that has been funded by Congress *at the request of the Indian tribes and of the IHS.* More importantly, the Court's decision reaffirms the longstanding fiduciary responsibility of this country to the American Indian tribes.

The United States has assumed a legal and moral responsibility to provide health care services to Indian tribes as a result of numerous treaties, executive orders, and statutes, in exchange for lands ceded to the United States. *See* Indian Health Care Improvement Act (IHCIA), 25 U.S.C. § 1601(a) (finding that "[f]ederal health services to maintain and improve the health of the Indians are consonant with and required by the Federal Government's historical and unique legal relationship with, and resulting responsibility to, the American Indian people"). That responsibility has been further defined by statutes, regulations, and court decisions.

One aspect of this responsibility is the principle of tribal consultation which the United States has imposed upon itself in order to reverse the paternalism that has historically permeated the federal-tribal relationship. *See* IHCIA, 25 U.S.C. § 1601(b) ("a major national goal of the United States is . . . to *encourage the maxi-*

mum participation of Indians in the planning and management of those services") (emphasis added). "Great nations, like great men, should keep their word." *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting). The decision below holds the United States to its word.

I. THE "LAW TO APPLY" TEST UNDER THE APA

The Government contends that the IHS's decision to terminate the ICP was committed to agency discretion within the meaning of 5 U.S.C. § 701(a)(2). The APA provides that an agency action is reviewable unless it is either precluded by statute or committed to agency discretion by law. 5 U.S.C. § 701(a)(1) and (a)(2). The second exception, for matters committed to agency discretion, "is a very narrow exception." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971). It applies only "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Id.* (quoting S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)). There is a "strong presumption that Congress intends judicial review of administrative action." *Bowen v. Michigan Academy of Physicians*, 476 U.S. 667, 670 (1986). In *Franklin v. Massachusetts*, —— U.S. ——, 112 S. Ct. 2767 (1992), four justices of this Court recently expressed the view that:

> "More generally, the Court has limited the exception to judicial review provided by 5 U.S.C. § 701(a)(2) to cases involving national security, such as *Webster v. Doe* [486 U.S. 592 (1988)] and *Department of Navy v. Egan* [484 U.S. 518 (1988)], or those seeking review of refusal to pursue enforcement actions, see *Heckler v. Chaney*, 470 U.S. 821 (1985); *Southern R. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979); *Morris v. Gressette*, 432 U.S. 491 (1977)." 112 S. Ct. at 2785 (parallel citations omitted).

In *Heckler v. Chaney*, 470 U.S. 821 (1985), this Court explained that the "no law to apply" test means "review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." 470 U.S. at 830. *See also Webster v. Doe*, 486 U.S. 592, 600 (1988). The District of Columbia Court of Appeals, in describing the narrowness of this exception, has specifically rebutted claims that only statutory language can supply "law to apply":

> "Even when there are no clear statutory guidelines, courts are often still able to discern from the statutory scheme a congressional intention to pursue a general goal. If the agency action is not found to be reasonably consistent with this goal, then the courts must invalidate it. The mere fact that a statute grants broad discretion to an agency does not render the agency's decisions completely nonreviewable under the 'committed to agency discretion by law' exception unless the statutory scheme, taken together with other relevant materials, provides absolutely no guidance as to how that discretion is to be exercised." *Robbins v. Reagan*, 780 F.2d 37, 45 (D.C. Cir. 1985) (footnote omitted).

Thus, judicial review is available whenever there are *any* "meaningful standards" against which to judge the agency's exercise of discretion. Even "background understandings" that inform the substantive statutes may often supply law to apply. *Id.* at 45, n.13.

In the present case, the IHS's exercise of discretion was its failure to notify those served by the ICP—the 426 handicapped Indian children and the Indian tribes to which they belong—that it was terminating the program. Accordingly, the issue before this Court is whether there are any meaningful standards against which to judge the IHS's failure to notify the Indians that it was terminating the ICP. Notice and comment procedures are especially important to insure that an agency's decision

is deliberate and made with the full consideration of its impact upon program beneficiaries. If the respondents in this case had received notice, then at least they could have petitioned both the IHS and Congress for assistance.

The Tenth Circuit properly concluded that the Snyder Act, 25 U.S.C. § 13, the IHCIA, 25 U.S.C. §§ 1601-83, Congressional intent to fund the ICP as revealed in the legislative history of five appropriations statutes [1], and the special trust relationship between the federal government and the Indian tribes, all supplied a meaningful standard

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[1] *Department of the Interior and Related Agencies Appropriations for 1985: Hearings Before the Subcomm. on Interior and Related Agencies of the House Comm. on Appropriations*, 98th Cong., 2d Sess., pt. 3, 486 (1984) (narrative submission describing continuation of the ICP);

Department of the Interior and Related Agencies Appropriations for 1984: Hearings Before the Subcomm. on Interior and Related Agencies of the House Comm. on Appropriations, 98th Cong., 1st Sess., pt. 3, 351 (1983) (narrative submission describing continuation of the ICP);

Department of the Interior and Related Agencies Appropriations for 1983: Hearings Before the Subcomm. on Interior and Related Agencies of the House Comm. on Appropriations, 97th Cong., 2d Sess., pt. 3, 167 (1982); H.R. Rep. No. 942, 97th Cong., 2d Sess., 54, 109 (1982).

Department of the Interior and Related Agencies Appropriations for 1982: Hearings Before the Subcomm. on Interior and Related Agencies of the House Comm. on Appropriations, 97th Cong., 1st Sess., pt. 9, 70-74 (1981);

Department of the Interior and Related Agencies Appropriations for 1981: Hearings Before the Subcomm. on Interior and Related Agencies of the House Comm. on Appropriations, 96th Cong., 2d Sess., pt. 3, 632 (1980);

Department of the Interior and Related Agencies Appropriations for 1980: Hearings Before the Subcomm. on Interior and Related Agencies of the House Comm. on Appropriations, 96th Cong., 1st Sess., pt. 8, 245-52 (1979) (IHS request for ICP funding); H.R. Rep. No. 374, 96th Cong., 1st Sess., 81-83 (1979) (designation of funding for expansion of ICP); S. Rep. No. 363, 96th Cong., 1st Sess. 90-91 (1979) (designation of funding for ICP).

of review and therefore constituted "law of apply" for purposes of judicial review.

The Government disagrees. In its brief, the Government maintains that: (1) congressional hearings and committee reports cannot provide a standard of review, relying primarily upon Justice Scalia's opinion in *International Union, U.A.W. v. Donovan*, 746 F.2d 855 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 825 (1985) (Petitioner's Brief at 18-23); and (2) neither the special trust relationship nor the Snyder Act, 25 U.S.C. § 13, supply law to apply (Petitioner's Brief at 16-17; 23-27). Both conclusions are wrong. The amici's brief, however, will focus on reviewability of the IHS's action to terminate the ICP under the APA, 5 U.S.C. § 701(a)(2).

The government's reliance upon *Donovan* is misplaced. Not only do the facts in *Donovan* differ significantly from those in this case, but so does the standard of responsibility to which the United States is held. Furthermore, this Court, as well as the lower courts, have permitted the use of legislative history in reviewing agency actions. Therefore, this Court should affirm the judgment below.

II. THE PRESENT CASE IS DISTINGUISHABLE FROM *DONOVAN*

Donovan held that legislative history cannot supply a standard of review for purposes of the APA. The present case, however, differs from *Donovan* in two significant respects: (1) this case involves federal-Indian relations in which context the United States is held to the stricter standards of a fiduciary; and (2) both the Executive Branch and Congress intended at the time of passage to continue the existence of the program.

A. The Unique Situation of Cases Involving Indian Tribes

Unlike *Donovan*, the present case involves the unique situation in which the federal government is held to a higher standard of a fiduciary rather than to the normal standards of conduct which might otherwise govern the actions of the Executive Branch concerning beneficiaries of congressional programs. "The overriding duty of our Federal Government to deal fairly with Indians wherever located has been recognized by this Court on many occasions." *Morton v. Ruiz*, 415 U.S. 199 (1974). That the trust responsibility is just as applicable to the IHS as it is to the Bureau of Indian Affairs is supported not only in law but also by the IHS's own regulations.

Generally, *all* federal agencies which undertake programs for the benefit of American Indians are bound by the trust obligation. Their actions must be governed by fiduciary standards. This Court stated in *Seminole Nation v. United States*, 316 U.S. 286 (1942), that the United States "has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians should therefore be judged by the most exacting fiduciary standards." 316 U.S. at 297. The Ninth Circuit recognized this principle in *Pyramid Lake Paiute Tribe of Indians v. United States Dep't. of the Navy*, 898 F.2d 1410 (9th Cir. 1990) when it said:

> "This court . . . has read the [fiduciary] obligation to extend to any federal government action. *Nance v. EPA*, 645 F.2d 701, 710, 711 (9th Cir.), *cert. denied*, 454 U.S. 1081 (1981). While most cases holding the government to this duty have involved Indian property rights, the government's trustee obligations apparently are not limited to property. *Morton v. Ruiz*, 415 U.S. 199, 236 (1974); Cohen's Handbook of Federal Indian Law at 225-28 (1982 ed.)." 898 F.2d at 1420 (parallel citation omitted).

See also Felix S. Cohen, *Handbook of Federal Indian Law* 226 (1982) ("Court decisions have also held that the ordinary fiduciary standards of a private fiduciary must be adhered to by executive officials administering Indian property or federal programs").

The IHS is also cognizant of its fiduciary duties. The regulations of the Secretary of Health and Human Services state:

> "*Trust Responsibility* means the responsibility assumed by the Government, by virtue of treaties, statutes and other means, legally associated with the role of trustee, *to recognize, protect and preserve tribal sovereignty* and to protect, manage, develop, and approve authorized transfers of interests in trust resources held by Indian tribes and Indian individuals to be a standard of the highest degree of fiduciary responsibility." 42 C.F.R. § 36.203(*l*) (1991) (emphasis added).

Thus, the Secretary's own regulations recognize the agency's obligation to support the exercise of authority by tribal governments, which includes the sovereign power to safeguard the health and welfare of tribal members. *See also* Cohen at 246.

The administration of programs, including the ICP, authorized under the Snyder Act are governed by strict fiduciary standards. In *Fox v. Morton*, 505 F.2d 254 (9th Cir. 1974), the Ninth Circuit Court of Appeals held that Indian plaintiffs were entitled to a due process hearing prior to termination from a program funded under the Snyder Act, explaining that:

> "At the outset, we recognize that assistance programs established under the Snyder Act are for the special benefit of Indians and Indian communities and must be liberally construed in their favor. *Ruiz stands for the principle that our government has an overriding duty of fairness when dealing with Indians*, one founded upon a relationship of trust for the

> benefit of these '. . . dependent and sometimes exploited people.' *The Snyder Act was enacted with this principle in mind, and its programs must be administered accordingly.*" 505 F.2d at 255 (emphasis added) (citations omitted).

Similarly, the administration of programs authorized under the IHCIA are also governed by strict fiduciary standards. In *White v. Califano*, 437 F. Supp. 543 (D.S.D. 1977), the court stated:

> "The Congress in 1976 stated that the federal government had a responsibility to provide health care for Indians. Therefore, when we say that the trust responsibility requires a certain course of action, we do not refer to a relationship that exists only in the abstract, but rather to a congressionally recognized duty to provide services for a particular category of human needs. The trust responsibility, as recognized and defined by statute, is the ground upon which the defendants' duties rest in this case.
>
> ". . .
>
> "We have, therefore, read and construed the Indian Health Care Improvement Act as a manifestation of what Congress thinks the trust responsibility requires of federal officials, with whatever funds are available, when they try to meet Indian health needs." 437 F.2d at 557.

The Eighth Circuit Court of Appeals affirmed per curiam. *White v. Califano*, 581 F.2d 697 (8th Cir. 1978).

The significance of the special relationship between the federal government and the Indian tribes is that ordinary standards of responsibility for agency conduct do not apply when Indian programs are at issue. Thus, while *Donovan* suggests that an agency might ordinarily escape judicial review if it were to misrepresent to Congress in budget requests its intention to continue a program, and to subsequently ignore committee recommendations, the unique trust relationship prevents the

IHS from making such representations to Congress and then ignoring them whenever its priorities change.

In this case, the IHS made repeated representations by submitting to Congress budget requests that asked for continued funding of the ICP. Naturally, these requests impliedly represented to tribes and to the Congress that the IHS intended to continue rather than terminate the ICP. The IHS's FY 1985 budget request states:

> "The *Indian Children's Program* (ICP) continues to function as a regional interagency IHS-BIA/Office of Indian Education Programs (OIEP) project which services emotionally, educationally, physically and mentally handicapped American Indian children and youth in the southwest. For individual children, the ICP is providing diagnostic, evaluation, treatment planning and follow-up services. For parents, community groups, school personnel and health care personnel, the ICP is providing training in child development, prevention of handicapping conditions, and care of the handicapped child. Training activities occur on both a regional and national basis. These activities respond to continued congressional interest in a national collaboration on behalf of handicapped children.
>
> "*. . . Every attempt will be made to retain the level of professional and paraprofessional staffing strengthened by the FY 1984 funding.*" Department of Health and Human Services, Indian Health Service, *Fiscal Year 1985—Volume VI—Justification of Appropriation Estimates for Comm. on Appropriations* 39-40 (1984) (emphasis added).

Shortly before its decision to terminate the ICP, the IHS again asked Congress for funds to continue the ICP. The IHS's FY 1986 budget request, submitted in early 1985, states:

> "To support the Indian Children's Program effort as an interagency IHS-BIA/Office of Indian Education Programs (OIEP) project which services emotionally, educationally, physically, and mentally handicapped American Indian children and youth. Program activities include consultation, training, and technical assistance in response to national requests with the preponderance of direct service responses being regionally focused." Department of Health and Human Services, Indian Health Service, *Fiscal Year 1986—Volume X—Justification of Appropriation Estimates for Committee on Appropriations* 56 (1985).

Since the IHS was asking for money which would not even be available until after October 1, 1985, it is fair to say that both Congress and the Indian tribes were entitled to expect the IHS to continue the ICP.[2] When the IHS later changed its priorities so that the appropriation was not to be spent as previously represented, the affected tribes had a right to expect that they would be consulted or *at least* notified. The IHS's 1986 budget request announced that "[t]he IHS has and continues to involve tribes in resource planning and allocation methodology to reflect tribal concerns." *Id.* at 38.[3]

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[2] The Comptroller General has said:

> "[W]here an amount to be expended for a specific purpose which is not otherwise prohibited is included in a budget estimate, the appropriation is legally available for the expenditure even though the appropriation act does not make specific reference to it." United States General Accounting Office, Office of the General Counsel, *Principles of Federal Appropriations Law*, 4-9 (1991) (citations omitted).

[3] The IHS has acknowledged the longstanding importance of tribal consultation in connection with its resource allocation procedures elsewhere:

> "Tribal Consultation Principle
>
> "Tribes and Indian people have important roles in determining IHS resources allocation strategies and policies. Tribes contribute to setting priorities during budget formulation. More importantly, tribal input to the Congress influences appropriations and often results in the specific directives for the use and

This Court has recognized in the unique sphere of Indian law that if a federal agency makes repeated representations to Congress when seeking funds for Indian programs, then the agency should be held to its word:

> "[I]t is essential that the legitimate expectation of these needy Indians not be extinguished by what amounts to an *ad hoc* determination of the agency that was not promulgated in accordance with its own procedures, to say nothing of the Administrative Procedure Act. The denial of benefits to these respondents under such circumstances is inconsistent with 'the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.'" *Morton v. Ruiz*, 415 U.S. at 236 (citations omitted).

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allocation of appropriated resources (earmarks)." Department of Health and Human Services, Indian Health Service, *Resource Allocation Abstracts; Basic Descriptive Information about IHS Appropriations, Allocation Formulae, and 1991 Allocations to Areas* 3 (1991).

The IHS's 1990 report to Congress on its resource allocation methodology, the Health Services Priority System, was distributed to all Indian tribes. It contained the following statements:

> "The statutory requirement for active participation in the planning, conduct, and administration of IHS programs by the recipient constituency is perhaps unique among Federal programs. This requirement has led to special efforts by the IHS to consult with and involve Indian tribes in the development of significant policies affecting health programs for Indian people.
>
> " . . .
>
> "[T]he Indian tribes expect, and the IHS has committed to the tribes, that they shall have an active voice in the further evolution of resource allocation policies for the IHS. It is this commitment that requires the IHS to consult with Indian tribes on the proposals contemplated for the current allocation methodology." Department of Health and Human Services, Indian Health Service, *Health Services Priority System—A Report to Congress* 28-30 (May 4, 1990).

Even announcements of policy provides a basis of judicial review. "Once an agency has declared that a given course is the most effective way of implementing the statutory scheme, the courts are entitled to closely examine agency action that departs from this stated policy." *Robbins v. Reagan*, 780 F.2d 37, 45 (D.C. Cir. 1985) (footnote omitted).

Appropriation of funds under the Snyder Act are governed by the strict standards imposed by the trust responsibility. In *Adams v. Hodel*, 617 F. Supp. 359 (D.D.C. 1985), the Indian plaintiffs challenged a BIA rule amending the "need" levels for several assistance funds. The *Adams* plaintiffs particularly objected to the BIA's reliance on language contained in a congressional appropriations report. They argued that it violated the requirements for reasoned decision-making because implied repealers of substantive statutes by subsequent appropriations acts are strongly disfavored. The court rejected that argument:

> "The Supreme Court has recognized that such directions from the Appropriations Committee govern the operation of the General Assistance program under the Snyder Act—which is, as has been noted previously, a very broadly worded appropriations authorization statute. See *Morton v. Ruiz*, 415 U.S. at 205-12. . . . [T]he BIA's reliance on explicit directions contained in the Appropriations Committee report, its usual source of directions, can hardly be said to have been improper." 617 F. Supp. at 362 (parallel citation omitted).

The court then explained:

> "This rather unique system of congressional oversight and direction of the General Assistance program renders this case readily distinguishable from . . . cases . . . cited by plaintiffs for the proposition that appropriations bills do not have the force of law and that committee reports are entitled to little weight as indicia of legislative intent. . . . This case . . . involves the use of annual appropriations legislation to give substantive content to an appropriations authorization statute which only derives its content from annual appropriations measures." *Id.* at 362, n.12.

The preceding paragraphs demonstrate why the respondents and the plaintiffs are uniquely situated. Unlike the situation presented in *Donovan*, the trust responsibility present here places the federal government in the role of a trustee. Its actions are to be judged by the "most exacting fiduciary standards." *Seminole Nation*, 316 U.S. at 297. These same fiduciary obligations have been recognized by the courts in cases involving the Snyder Act and the IHCIA. *See* pp. 12-13, above. Furthermore, the IHS itself has recognized this obligation in its own regulations. *See* p. 12, above. The IHS has also announced a policy of tribal consultation, even in matters involving resource allocation. *See* pp. 15-16, above. Finally, the IHS's FY 1985 and 1986 budget requests for congressional funding of the ICP created a legitimate expectation in the Congress and the Indian tribes that the IHS would continue the ICP.

Therefore, the substantive laws in this case, the Snyder Act and the IHCIA, both provide meaningful standards of judicial review since they place the IHS in the role of a fiduciary. Similarly, the IHS's own regulations place the IHS in the role of a fiduciary. Furthermore, the IHS's own policy statements require the IHS to consult with tribes on matters involving resource allocation. Thus, when the IHS terminated the ICP, it not only acted contrary to its own previous representations to the tribes and Congress, it also failed to follow its own policy of consultation. Most importantly, by abandoning the handicapped children served by the ICP, the IHS violated its own duties under the Snyder Act and the IHCIA as a fiduciary. Accordingly, this Court should affirm the decision below.

B. The Present Case is Factually Different From *Donovan*

The facts in *Donovan* are substantially different from the facts in the present case. Accordingly, the Tenth Circuit's decision does not conflict with the views expressed by the District of Columbia Court of Appeals in *Donovan*.

In *Donovan*, the Court was asked to determine whether the Secretary of Labor's decision not to allocate any of a lump-sum appropriation of $3.7 billion to the Department of Labor's Employment and Training Administration for purposes of carrying into effect the Trade Act training program, was judicially reviewable.

In 1981 Congress amended the Trade Act of 1974 to authorize the Secretary to approve training for workers under certain circumstances, but did not require him to do so. 19 U.S.C. § 2296(a)(1) (1976); *Donovan*, 746 F.2d at 862 ("the Secretary is *not* required by the substantive statute to approve training for those who meet the conditions of § 2296(a)(1)") (emphasis in original). In 1982, Congress funded the Department of Labor's operations through four continuing resolutions. The first contained a general funding provision of $3.7 billion for the Department's Employment and Training Administration which administers the Trade Act training program. The second continuing resolution merely extended the first resolution's expiration date and contained no new directives. The third continuing resolution, however, expressly provided $25 million for the Trade Act training program. The fourth continuing resolution merely extended the third resolution's expiration date. The district court held that the Secretary acted unreasonably in allocating only $25 million to the Trade Act training program. The Court of Appeals reversed.

The *Donovan* court found that in the absence of specific directives, nothing in the $3.7 billion appropriation bill required the Secretary to spend any of that money on the training program. 746 F.2d at 863 ("It carefully specifies that $2,001,000 of this shall be for the National Commission for Employment Policy but provides no direction as to how the remainder is to be distributed.") In fact, "[t]he legislative history shows at least a congressional realization, if not a congressional intent, that nothing would be expended for Trade Act training out of the

$3.7 billion lump-sum appropriation." *Id.* at 859. In fact, efforts made prior to passage to amend the $3.7 billion appropriation to specifically earmark money for the training program were defeated. *Id.* at 860. Thus, in *Donovan*, there was not even any legislative history, much less statutory language, which supported the plaintiff's contention that the Secretary was required to spend more than $25 million on the Trade Act training program. By contrast, the legislative history in this case clearly demonstrates the IHS's intention to continue the ICP. Furthermore, the legislative history also demonstrates that Congress was aware of the ICP and intended for the IHS to continue the program. Therefore, the government's reliance upon *Donovan* is misplaced.

In *Blue Ocean Preservation Society v. Watkins*, 767 F. Supp. 1518 (D. Haw. 1991), the court was presented with a claim by the Department of Energy that "the Conference Committee language directing the use of appropriated funds to prepare an EIS 'is not binding on the agency.'" 767 F. Supp. at 1522. The court responded:

> "In making this claim, the Government relies on *Intern. Union v. Donovan*, 746 F.2d 855, 861 (D.C. Cir. 1984) . . . . The court is not persuaded that the Congressional appropriation at issue here is such a 'lump-sum appropriation.' The appropriation was very specifically earmarked." *Id.* at 1522, n.2.

The instant case presents a similar situation. Unlike *Donovan*, the agency never stated that it did not support the program. In fact, in our case, Congress appropriated money to an agency that had specifically asked for money to continue a program. Since Congressional intent for IHS to continue the ICP provides "law to apply," the IHS's decision to terminate the ICP is reviewable.

III. NONE OF THE FACTORS PRECLUDING JUDICIAL REVIEW IN JUSTICE SCALIA'S *WEBSTER* DISSENT ARE PRESENT

Even under the additional limitations suggested by Justice Scalia in *Webster v. Doe*, 486 U.S. 592 (1988) (Scalia, J., dissenting), the IHS's action is subject to judicial review. In the *Webster* dissent, Justice Scalia wrote that the "common law" of judicial review of agency action suggests that certain issues and areas are beyond the range of judicial review, even in the presence of "law to apply." 486 U.S. at 608. These areas include:

> "[P]rinciples ranging from the 'political question' doctrine, to sovereign immunity . . ., to official immunity, to prudential limitations upon the court's equitable powers, to what can be described no more precisely than a tradition of respect for the functions of the other branches reflected in the statement of *Marbury v. Madison*, 1 Cranch 137, 170-171 (1803), that '[w]here the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation.'" *Id.* at 608-609.

Thus, Justice Scalia argued, the Supreme Court has taken into account not only the "text and structure of the statute under which the agency acts" but such factors as:

> "[W]hether the decision involves a 'sensitive and inherently discretionary judgment call,' whether it is the sort of decision that has traditionally been nonreviewable, and whether the review would have 'disruptive practical consequences' . . . ." *Id.* at 609 (citation omitted).

The IHS's decision to terminate the ICP without first providing any notice to the beneficiaries is not precluded by any of these other factors.

First, the IHS's decision does not involve a sensitive and inherently discretionary judgment call. With re-

spect to Indians, the courts have routinely reviewed federal agency decisions involving the allocation of funds and the termination of benefits. *See e.g., Morton v. Ruiz*, 415 U.S. 199 (1974) (review of BIA's allocation of limited funds under the Snyder Act); *Rincon Band of Mission Indians v. Harris*, 618 F.2d 569 (9th Cir. 1980) (review of the IHS's distribution of funds for violations of the IHS's statutory, trust, or constitutional duties to the California Indians); *Vigil v. Andrus*, 667 F.2d 931 (10th Cir. 1982) (review of the withdrawal of free school lunch program from Indian children, noting that the trust relationship "suggests that the withdrawal of benefits from Indians merits special consideration").

Second, the IHS's decision is not the sort of decision for which review traditionally has been precluded. As previously noted, this narrow class more properly applies to cases involving national security and to those seeking review of refusal to pursue enforcement actions. *See Franklin v. Massachusetts*, 112 S. Ct. at 2785 (Stevens, J., concurring). *See also Heckler v. Chaney*, 470 U.S. at 832. Furthermore, "[t]he overriding duty of our Federal Government to deal fairly with Indians wherever located has been recognized by this Court on many occasions." *Morton v. Ruiz*, 415 U.S. at 236 (1974).

Finally, review of the IHS's decision will not have disruptive practical consequences. Neither the district court nor the court of appeals held that the IHS could not have terminated the ICP, or other programs similarly situated. Rather, the decisions below simply required that the IHS follow proper notice and comment procedures as required under the APA. Furthermore, the judicial review of this case served an important purpose—to safeguard the interests of a small and historically disadvantaged minority, who have often turned to the courts as the only means by which to assert and protect their rights. Therefore, the courts may properly review the IHS's decision to terminate the ICP without first providing notice to the respondents.

IV. THE USE OF LEGISLATIVE HISTORY IS PERMISSIBLE

Contrary to the government's assertions, this Court has turned to legislative history when searching for law to apply. In *Webster v. Doe*, 486 U.S. 592 (1988), the Court examined "the overall structure" of the National Security Act in order to determine if the NSA was drawn so that a court would have no meaningful standard against which to judge an agency's actions. 486 U.S. at 600. That law, included both Senate and House reports. *Id.* at 601-02 (citing S. Rep. No. 239, 80th Cong., 1st Sess., '2 (1947); H.R. Rep. No. 961, 80th Cong., 1st Sess., 3-4 (1947)). The Court concluded that "the language and structure of § 102(c) indicate that Congress meant to commit individual employee discharges to the Director's discretion" and therefore were unreviewable under 5 U.S.C. § 701(a)(2). *Id.* at 601. *See also Robbins v. Reagan*, 780 F.2d 37 (D.C. Cir. 1985).

The Courts of Appeals often resort to legislative history in appropriate circumstances. In *McNabb v. Bowen*, 829 F.2d 787, (9th Cir. 1987), the Ninth Circuit specifically applied the trust responsibility to the IHS's actions in determining whether the IHS was a primary or residual provider. 829 F.2d at 793 ("Once again, this question must be answered in terms of congressional intent and the federal government's overriding trust responsibility"). The Ninth Circuit stated that "[w]e may refer to reports of the congressional appropriations committee for guidance in determining the proper rules for providing Indian health assistance." 829 F.2d at 793, n.6. In *Singh v. Moyer*, 867 F.2d 1035 (7th Cir. 1989), the court held that "[i]n determining whether a 'meaningful standard' for review is available, this court considers four areas: the statutory language, the statutory structure, the legislative history, and the nature of he agency action." 867 F.2d at 1038.

Furthermore, the government errs in asserting that legislative history can never "supply law." In *Chevron*

U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), this Court answered this contention:

> "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." 467 U.S. at 843, n.9.

Thus, when Congress relies upon agency representations and appropriates money with the intention to fund a program, that intent is the law, and provides a standard of review. Furthermore, the use of Congressional intent is especially appropriate in situations where the actions of a federal agency in the role of a fiduciary shape that intent. Therefore, this Court has the authority to review the IHS's termination of the ICP.

SUMMARY

The Government's reliance on *Donovan* to support the proposition that the agency's action is nonreviewable under the APA is misplaced since this case differs significantly from *Donovan* in two respects. First, the unique fiduciary responsibilities of the United States in this instance hold the IHS's conduct to a higher standard than that required of the *Donovan* agency. Thus, while under normal circumstances, an agency's representations to Congress and to the beneficiaries it serves might not provide meaningful standards of review, the IHS's representations to Congress and to the Indian tribes do so here. Furthermore, the *Donovan* agency never represented to Congress that it supported the program in controversy nor did its actions ever disregard the intentions of Congress. Furthermore, even the additional limitations suggested by Justice Scalia in his *Webster* dissent do not preclude review. Finally, the Government's contention that legislative history may never supply "law to apply" is erroneous. Therefore, the IHS's decision to ter-

minate the ICP without any prior notice is not committed by law to agency discretion.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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